STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

In re: Matt Shirk,

Respondent.
_____/

DOAH Case No. 19-3434EC
Complaint No. 15-002R

ADVOCATE'S EMERGENCY MOTION FOR ORDER OF PROTECTION

COMES NOW, the Advocate for the Commission on Ethics, pursuant to Rule 1.280(c), Florida Rules of Civil Procedure, and Rule 28-106.204, *Florida Administrative Code*, and respectfully moves this Court to issue an order prohibiting Respondent from subpoenaing, deposing, and/or calling Cristian Fernandez to testify at the final hearing in this matter, and as good grounds states:

1. This matter is scheduled for a final hearing in Jacksonville on Friday, August 23, 2019.

2. Three ethical violations are alleged in this case, two of which Respondent admits. The third allegation will proceed to hearing on the above scheduled date.

3. Respondent listed Cristian Fernandez as his witness in the Joint Pre-Hearing Stipulation which was filed with the Court on August 14, 2019. The substance of Fernandez's testimony would be whether he waived the attorney-client privilege which then allowed Respondent to disclose confidential communications.

4. The Advocate vehemently opposes a deposition of Cristian Fernandez or calling him to testify at the final hearing due to potential psychological and emotional trauma, and the harassment, and/or embarrassment to this non-essential witness.

BACKGROUND

5. Respondent, Matt Shirk, served as the Public Defender for the Fourth Judicial Circuit of Florida during all pertinent times.

6. On June 2, 2011, the Duval County Grand Jury indicted Cristian Fernandez, a 12-year-old child, for first degree murder and aggravated child abuse in the death of his younger sibling.

7. On June 4, 2011, the Office of the Public Defender for the Fourth Judicial Circuit of Florida was appointed to represent Cristian Fernandez. Public Defender Matt Shirk, in his official capacity as Public Defender, acted as Fernandez's counsel.

8. On June 8, 2011, Cristian Fernandez, was arraigned on first degree murder charges and, along with advice from his attorney, waived speedy trial. At the time, Fernandez was the youngest murder defendant in Duval County history.

FERNANDEZ'S PSYCHOLOGICAL STATE DURING THE RELEVANT TIME PERIOD

9. On June 27, 2011, after hearing witness testimony, reviewing a psychological report prepared by the State's physician, and arguments of counsel, Chief Judge Donald R. Moran, Jr. ordered that Fernandez be transferred from the adult Pretrial Detention Facility, where he was being detained in isolation, to the Juvenile Detention Facility.

10. In the June 27, 2011 Order, Judge Moran found that Fernandez "is small in stature for his age" and, while he is 12 years old, Fernandez "is emotionally and psychologically younger than that age."

11. The defense sought to suppress statements made by Fernandez, arguing that he was incompetent to understand and, therefore, could not waive his constitutional right to remain silent.

12. Fernandez was the subject of several psychological examinations and evaluations at the defense's request prior to entering into a plea deal in February 2013.

13. Defense expert, Dr. David Fassler, established at an evidentiary hearing that Fernandez:

> did not waive his [Miranda] rights with a full awareness of the nature of the rights being abandoned and the consequences of the decision to abandon them. Dr. Fassler testified that even under the best of circumstances, it would be difficult for any twelve-year old to understand Miranda warnings and the consequences of waiving their rights. Dr. Fassler stated that there were many additional factors which compromised Defendant's ability to appreciate the consequences of waiving his rights. These additional factors include stress, sleep deprivation, a history of abuse, expressive and receptive language deficits, and learning disabilities. Ultimately, Dr. Fassler opined that given the totality of the circumstances and Defendant's background, Defendant was not able to fully comprehend, understand, or interpret the Miranda warnings. Moreover, Defendant did not appreciate the consequences of the decisions he was making. Order Granting, in part, and Denying, in part, Defendant's Motions to Suppress Statements; Exhibit "A."

14. During the same hearing, defense expert, Dr. Marty Beyer, opined that Fernandez "was unable to knowingly, intelligently, and voluntarily waive his Miranda rights." This conclusion was based on Fernandez's comprehension being impaired by his immature thinking, his inability to understand the importance of the custodial interview, and his inability to see how it could be used against him in future court proceedings. *Id.*

15. Based on these expert opinions, the court found that Fernandez did not comprehend the Miranda rights or understand the consequences of waiving them. Therefore, he did not knowingly and voluntarily waive his rights and statements Fernandez made post-Miranda were suppressed. *Id.*

16. The same can be said of Fernandez's mental capability during this general time period to understand his attorney-client privilege and comprehend the ramifications of waiving it – if, in fact, he did.

17. When it was critical, implications of Fernandez's disabilities – his young age and tragic early years as documented in the court pleadings – affected his ability to comprehend and validly waive his absolute privilege to confidential communications with his attorney.

GUARDIAN AD LITEM APPOINTED –
FERNANDEZ NON-ESSENTIAL WITNESS

18. As early as December 5, 2011, Respondent recognized that Fernandez did not have the capacity to make significant decisions. Respondent requested the Court appoint a Guardian Ad Litem for the "child's welfare." Respondent wrote that Fernandez needed "a learned intermediary" to serve between him and the attorneys representing him. Respondent was concerned that at his tender age, Fernandez "must not be required to continue in these unique circumstances to make grave decisions without a guardian ad litem to serve as parental advisor, next friend, and intermediary with his defense counsel" and to "ensure that [Fernandez] and his defense counsel communicate fully and with complete understanding as decisions are made . . . [and] those communications shall be protected by the attorney-client privilege." Amended Motion to Appoint Guardian Ad Litem, filed December 5, 2011. Exhibit "B."

19. Hugh Cotney, Esquire, accepted the court's appointment to act as Fernandez's Guardian Ad Litem. He would have been in the sole position to waive the privilege on behalf of Fernandez. He will be at the August 23 hearing and available for cross examination by Respondent.

20. Florida Bar Rule of Professional Conduct 4-1.6(a), states that an attorney "must not reveal information relating to representation of a client . . ., unless the client gives informed

consent."[1] "Informed consent," as defined in the Preamble to the Rules of Professional Conduct, "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of reasonably available alternatives to the proposed course of conduct." If it is not reasonable to obtain written confirmation at the time the client gives informed consent, then the attorney must obtain it within a reasonable time. If an attorney has obtained a client's informed consent, the attorney may act in reliance on that consent so long as it is confirmed in writing within a reasonable time. See, "Comment," Preamble – Lawyer's Responsibilities, Rules of Professional Conduct.

21. Respondent did not receive written consent. Regardless of whether Respondent received written or oral consent from Fernandez, since he was a minor, Guardian Ad Litem Cotney was the only person authorized to waive Fernandez's attorney-client privilege. §90.502, Fla. Stat.

22. Thus, due to Fernandez's disabilities based on youth and mental state, he was incapable of waving his privileges and rights. **Guardian Ad Litem Cotney is the sole witness who can testify as to whether valid consent was given. That makes Fernandez a non-essential witness.**

FERNANDEZ'S CURRENT WELL-BEING

23. Dr. Stephen I. Bloomfield, Ed.D., a Licensed Psychologist in Florida and Massachusetts, has known Fernandez since his arrest in 2011. The Advocate spoke to Dr. Bloomfield on August 8, 2019, to inquire into Fernandez's current mental state and any potential effect of being called to testify at the August 23 hearing. Dr. Bloomfield relayed that during the criminal proceedings, young Fernandez was surrounded by chaos. He has served his time and is trying to move on. It has been a difficult road and would be a potential set-back for him to be asked

[1] There are several exceptions to this rule; however, none of them apply in this case.

to sit in a courtroom again and to unnecessarily re-live events for something which he could not have consented to anyway and which should have been confirmed in writing (waiver) – and was not. Dr. Bloomfield's current belief is that it would be a hinderance for his rehabilitation to subject him to an unnecessary court appearance.

24. Dr. Bloomfield advised that it would not be in Fernandez's best interests to have him testify in in this court proceeding.

GRAND JURY PRESENTMENT

25. In 2014, the Duval County Grand Jury investigated whether Fernandez waived his attorney-client privilege. Exhibit "C." The Grand Jury reviewed court documents, the findings of the court, and expert witnesses' reports, and heard testimony on the issue.

26. Since Fernandez's did not have the ability to waive his Miranda rights, the Grand Jury extrapolated that he was similarly incapable of understanding and waiving his absolute right to confidentiality pertaining to matters he discussed with Respondent, his counsel.

27. In reference to Guardian Ad Litem Cotney's responsibilities, the Grand Jury wrote:

> The Guardian Ad Litem was to stand in a position of parental authority to Mr. Fernandez, and serve as an advocate for the best interests of the child." Based upon the testimony of several experts, that Fernandez's young age and mental development made him unable to understand fundamental legal principles such as his right to remain silent and his right to an attorney. As a result, the Court found no such waiver could ever be knowing and voluntary. Shortly after Fernandez entered a plea, and within the thirty day period which the Guardian Ad Litem was still appointed by the court to represent Fernandez, Shirk [Respondent] gave an interview with the aforementioned documentary crew. During the end of that interview Shirk made the following statement 'Let me tell you what Cristian told me....' Shirk then proceeded to recount a version of events surrounding the crime that Fernandez disclosed to Shirk, in an apparent privileged capacity. This disclosure came to light when the documentary aired in July of 2014."

Further, the Grand Jury wrote:

> It is clear Fernandez's statements, should they have actually occurred, were privileged communication to his attorney. The Grand Jury was not provided with any credible evidence, such as documents, notations, or memorandum that Fernandez ever authorized a waiver of attorney-client privilege. Further testimony indicated that there was a lack of any such notation in the file. Additionally, no attorney or Guardian Ad Litem had been contacted by Shirk regarding a waiver of privilege or disclosure of privileged information. **Testimony indicated that Fernandez denies waiving attorney client privilege.**
>
> While Shirk claims he did obtain some sort of waiver from Fernandez during the period of the Public Defender's representation, when Fernandez was a child, the Grand Jury does not find such testimony credible. Moreover, in light most favorable to Shirk, even had such a waiver been obtained, it is unlikely such a waiver would be valid given Fernandez's age and the court's findings on a similar matter on the Motion to Suppress. Finally, it is inconceivable that an attorney of Shirk's experience and position would engage in such public disclosure of indisputable privileged information without consulting the child's legal guardians or attorneys, which did not occur. (Emphasis added.)

28. Fernandez did not have information of probative value back then and, years later as a young adult, he still does not have information of probative value.

CONCLUSION

29. As Fernandez's counsel, Respondent saw a need to protect young Fernandez's welfare. The need to protect his welfare continues today. Fernandez is a non-essential witness, thus, there is no reason to expose him to potential emotional trauma through yet another appearance in a judicial setting.

30. The bottom line is that Fernandez should not be required to participate in this litigation. The probability of detriment to Fernandez's well-being outweighs the probability of any meaningful assistance to Respondent. Especially, since Guardian Ad Litem Cotney is the critical witness on the question presented to this Court.

WHEREFORE, the Advocate respectfully requests this Honorable Court enter an Order of Protection prohibiting Respondent from subpoenaing, deposing, or calling Cristian Fernandez as a witness in this case.

RESPECTFULLY SUBMITTED on the 19th day of August, 2019.

Elizabeth A. Miller

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Emergency Motion for Protective Order, along with exhibits, was sent via e-mail only to Respondent, Matt Shirk, Esquire, 25 North Market Street, Jacksonville, Florida 32202; at e-mail: mshirklaw@aol.com, on this 19th day of August, 2019.

Elizabeth A. Miller

Elizabeth A. Miller

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NOS.: 16-2011-CF-06222-AXXX
16-2012-CF-00136-AXXX

DIVISION: CR-D

STATE OF FLORIDA,

vs.

CRISTIAN FERNANDEZ,
Defendant.
_____/

ORDER GRANTING, IN PART, AND DENYING, IN PART, DEFENDANT'S MOTIONS TO SUPPRESS STATEMENTS

This matter came before this Court on Defendant's Motion to Suppress Statements of June 15, 2011, Motion to Suppress Statements of June 23, 2011, Memorandum of Law in Support of Motions to Suppress Statements, and Supplemental Memorandum of Law in Support of Motions to Suppress Statements. This Court held an evidentiary hearing on June 28, June 29, July 2, and July 3, 2012. Upon consideration of the evidence presented, and having considered the arguments and authorities presented by the parties, and having otherwise been fully advised, this Court finds as follows:

Facts

On the evening of March 14, 2011, around 8:20 p.m., Officer Joey Devereaux of the Jacksonville Sheriff's Office ("JSO"), was dispatched to the residence of the twelve-year-old Defendant, with instructions to pick up Defendant and his younger brother, [redacted] No guardians or family members were present at the residence with Defendant and [redacted] Officer Devereaux took

them to the Police Memorial Building ("PMB") in his patrol car. Once there, Officer Devereaux led them to the family waiting area of the homicide detective division, where they stayed for several hours.

Around 1:30 a.m., JSO Detectives B. F. Houghland and Michelle Soehlig took Defendant out of the family waiting area and moved him to an open office area in the homicide division. The Detectives considered Defendant to be a witness in regard to fatal blunt force injuries inflicted upon his other younger brother, D.G. The Detectives would have normally interviewed Defendant in the family waiting area, however, that area was occupied by his family members. Defendant's mother, Biannela Susana, was also in the homicide division, but was considered a suspect and was in an interview room. Defendant did not know his mother was there.

During the initial interview of Defendant, Detective Soehlig questioned Defendant and Detective Houghland took notes. Detective Soehlig began the conversation by asking Defendant where he lives and goes to school. Detective Soehlig then asked Defendant what his knowledge was of how his brother was injured. Detective Soehlig also questioned Defendant about a previous leg injury to D.G. With regard to the leg injury, Defendant stated that D.G. fell from monkey bars. Detective Soehlig then asked if that was really what happened, and Defendant said D.G. did not fall from monkey bars. Defendant explained that it was an accident and that the injury occurred when he put D.G. in an Indian yoga move. Defendant stated that his mother told him to lie and say that D.G. had fallen.

In regard to the blunt force trauma, Defendant explained that D.G. had fallen from a bunk bed and hit his head on the ladder. Detective Soehlig asked Defendant to further explain and Defendant stated that D.G. was carrying books on his head, the books fell on his head, and then he

fell. Detective Soehlig told Defendant that the injuries were too severe to have been caused by a falling off a bunk bed or by books falling on D.G.'s head. Detective Soehlig believed that Defendant was covering for his mother and asked if his mother did something to D.G. Defendant stated that his mother did not do anything. Detective Soehlig then asked Defendant if he did something to D.G., and Defendant responded "um-hum." Defendant then became a potential suspect, and Detective Soehlig stopped the interview.

Detecive Soehlig then notified Defendant's mother that she was going to interview him. Defendant was taken to a recorded interview room. Due to Detective Soehlig's experience with talking with children, Detective Soehlig interviewed Defendant by herself.[1] Detective Soehlig wanted Defendant to feel comfortable, so she left the interview room door open. Detective Soehlig used a Constitutional Rights Form, and at 2:25 a.m., read Defendant's Constitutional rights to him:

> Detective: These are called your constitutional rights. And I know you're 12 years old, right?
>
> Defendant: Yeah.
>
> . . .
>
> Detective: Okay. All right. So I want to explain these to you to where you can understand them. Okay? I'm going to read it to you and then I'm going to explain to you what it means and then you can let me know if you understand them or not. Okay?
>
> Defendant: Okay.
>
> . . .
>
> Detective: . . . Okay. What this says is this is your constitutional rights. Okay? And this is what they mean. I'm going to read it to you. Okay? It

[1]During her time with the JSO, and prior to becoming a homicide detective, Detective Soehlig worked as a school resource officer, a child abuse detective, and a sex crimes detective.

says you have the following rights under the United States Constitution. The first one says you do not have to make a statement or say anything. Do you understand what that means Cristian?

Defendant: No.

Detective: Okay. This means you don't have to talk to me when I talk to you and you don't have to - - you don't have to tell me anything and you don't have to say anything, but you can say something. It just tells you that you don't have to. Do you understand what that means?

Defendant: Um-hum.

Detective: I'll read it again. You do not have to make a statement or say anything. So that means you don't have to talk to me, but I want you to talk to me, but you don't have to talk to me. Okay?

Defendant: Um-hum.

Detective: Okay. So you understand what that means?

Defendant: Um-hum.

Detective: Okay. The next one says anything - - anything you say can be used against you in court. Do you know what that means?

Defendant: Um-hum.

Detective: Okay. That means anything that you tell me today, it can come back up later in court. Okay? Do you understand what that means?

Defendant: Um-hum.

Detective: Okay. Yes?

Defendant: Um-hum.

Detective: I just need you to say yes.

Defendant: Yes.

Detective: Okay. The next one says you have the right to talk to a lawyer for advice before you make a statement or before any questions are asked

of you and to have the lawyer with you during any questioning. What that means is you can have a lawyer with you while I talk to you, but you don't have to. It just says that you can - - you have that right, that you can have one. Do you understand what that means?

Defendant: Um-hum.

Detective: Okay. The next one says that if you cannot afford to hire a lawyer, one will be appointed for you before any questioning if you wish. That means if you don't have the money for a lawyer - - which I know [you're] 12 so that would be your mom's, you know, responsibility to get a lawyer for you. If you don't have the money for one that we will give you one. Do you understand what that means?

Defendant: Um-hum.

Detective: Okay. The last one says if you do answer questions, you have the right to stop answering questions at any time and consult with a lawyer. That means while you're talking to me you can stop at any time, okay, and ask for a lawyer. Do you understand what that means?

Defendant: Um-hum.

Detective: Okay. I just wanted to explain that to you where you understood it. Okay?

Defendant: Okay.

(Evidentiary Hr'g tr. at 121-25, June 28, 2012.) Defendant then signed the Constitutional Rights Form. Detective Soehlig did not ask Defendant to explain the rights in his own words and stated that such an idea never occurred to her. Detective Soehlig has not received training about interrogating juveniles. Detective Soehlig stated that when giving Miranda warnings, she uses the same approach whether the suspect is a twelve-year-old child or a sixty-year-old man.

Following the administration of the Miranda rights, Defendant was interrogated regarding D.G.'s injuries. Once the interview with Defendant concluded, Detective Soehlig interviewed his

mother. Detective Soehlig instructed Defendant's mother to speak with Defendant about the incident. Detective Soehlig took Defendant to his mother's interview room, where Defendant's mother questioned him about what happened to D.G.

Both Defendant and his mother were subsequently arrested. On June 2, 2011, Defendant was indicted as an adult on the charges of First Degree Murder and Aggravated Battery. The following day, Defendant was transferred from a juvenile facility to the adult Duval County Detention Center. From June 3, 2011, through June 23, 2011, in an effort to keep Defendant separate from adult inmates, Defendant was held in an isolation cell at the detention center. During this period in isolation, Defendant received twenty visits, including Defendant's lawyers, and others working on his behalf, as well as personal visitors. On June 23, 2011, Defendant was transferred back to a juvenile facility.

On June 15, 2011, Detective Lisa Perez was assigned to a sex crime investigation involving Defendant and his younger brother, [redacted] During the course of her investigation, Detective Perez decided to interview Defendant. Detective Perez spoke to Detective Soehlig and learned that Defendant did not invoke his rights during his previous interrogation on March 15, 2011. Detective Perez also met with State Attorney Angela Corey and Assistant State Attorney Mark Caliel to discuss the upcoming interview. Prior to interviewing Defendant, Detective Perez did not attempt to contact Defendant's mother because she was charged in the same incident and Detective Perez did not contact Defendant's father because she was aware he had never been involved in Defendant's life. Nor did Detective Perez attempt to contact Defendant's lawyer, attorney ad litem, or legal custodian.

On June 23, 2011, Detective Perez, accompanied by Detective Whitaker, brought Defendant from the detention center to the PMB. Detective Perez explained to Defendant that she would like

to speak to him about a matter, but did not tell Defendant what the matter was. Detective Perez put Defendant in an interview room in the sex crimes office. While Detective Perez left the room to retrieve paperwork, Defendant looked around the room and stated, "I wonder where the camera is." Detective Perez returned and explained to Defendant that she was not there to discuss the charges upon which he was already incarcerated. Detective Perez then reviewed the JSO's Constitutional Rights Form with Defendant:

Detective: Before we start talking I have to redo your rights, okay, because you have the right to talk to me or the right not to talk to me. Okay? So I have to go over this paper with you and then when we're finished, if you're willing to talk, then you'll just sign the bottom and I'll sign the bottom also. Okay?

Defendant: Okay.

Detective: And I'll explain everything that I need to talk to you about. Okay?

Defendant: Okay.

. . .

Detective: I want you to read that top line for me.

Defendant: You have the following rights under the United States Constitution.

Detective: Okay. You do not have to make a statement or say anything. Do you understand that, Cristian?

Defendant: (Nods head.)

Detective: Anything you say can be used against you in court. Do you understand that, Cristian?

Defendant: Yeah.

Detective: You have the right to talk to a lawyer for advice before you make a statement or before any questions are asked [of] you and to have the lawyer with you during any questioning. Do you understand?

Defendant: Yeah.

Detective: If you cannot afford to hire a lawyer, one will be appointed before any questioning, if you wish. Do you understand?

Defendant: Yeah.

Detective: If you do answer questions, you have the right to stop answering questions at anytime and consult with a lawyer. Do you understand?

Defendant: Yeah.

Detective: Do you understand everything I've said?

Defendant: Yeah.

Detective: Okay. Do you wish to talk to me today, Cristian?

Defendant: I don't know what we're going to talk about.

Detective: Okay. Well, I'm going to get into that. I just have to make sure that you're willing to talk to me to find out what I'm wanting to talk to you about.

Defendant: Yeah.

Detective: Okay? All right. If you'll sign right there.

(Evidentiary Hr'g. tr. at 320-23, June 29, 2012.)

Defendant then signed the Constitutional Rights Form and Detective Perez interrogated him regarding the sex crimes investigation. Defendant did not ask to speak with a parent, guardian, or lawyer. As the interrogation was concluding, Defendant asked Detective Perez about the rights:

Detective: Okay. Do you want a drink of water or anything before we go back over?

Defendant: Well, was the - - the - - rules on paper actually will - - the rights were between you and me?

Detective: Yes. What do you mean? What are you asking me? I'm not sure.

Defendant: Like the right to have an attorney.

Detective: Um-hum.

Defendant: Oh, that's just the right?

Detective: The form?

Defendant: Um-hum.

Detective: Yeah. When we talked about that, that's basically, you know, me getting permission from you that you want to talk to me. And I couldn't have talked to you and learned all the things about you unless you said it was okay. And I appreciate you talking [to] me. And, you know, I - - hopefully none of this will happen t[redacted] anymore like it did to you and it shouldn't have happened to you. It's not supposed to happen to kids. Okay. All right. Any other questions?

Defendant: No.

(Evidentiary Hr'g. tr. at 375-76, June 29, 2012.) Defendant was subsequently charged with Sexual Battery.

The Instant Motions

In the instant Motions, Defendant seeks suppression of the statements he made on March 15, 2011 and June 23, 2011. These statements include Defendant's March 15, 2011 pre-Miranda statement to Detectives Soehlig and Hougland; Defendant's March 15, 2011 post-Miranda statements to Detective Soehlig; Defendant's March 15, 2011 statements to his mother; and Defendant's June 23, 2011 statements to Detective Perez. Defendant argues that 1) he was in custody at the time each of the statements were made; 2) he did not knowingly, intelligently, and voluntarily waive his Constitutional rights at any time prior to making these statements; and 3) his statements were not freely and voluntarily made. The State argues that Defendant was intelligent

and capable of understanding the Miranda warnings and that the totality of the circumstances demonstrate Defendant's understanding of the warnings.

Expert Testimony

During the evidentiary hearing, Defendant presented the expert testimony of Dr. David Fassler and Dr. Marty Beyer. Both experts opined that on March 15, 2011 and June 23, 2011, Defendant did not comprehend the Miranda warnings, and did not knowingly, intelligently, and voluntarily waive his Constitutional rights.

A. Opinion of Dr. David Fassler

Dr. Fassler is a board certified child and adolescent psychiatrist, as well as a clinical professor. Dr. Fassler interviewed Defendant for five hours on February 23, 2012 and again at the end of May 2012. Dr. Fassler reviewed materials related to Defendant and the instant cases, including the DVDs of both interrogations, Defendant's educational records, Defendant's Department of Children and Families ("DCF") records, and the JSO's Constitutional Rights Form. Dr. Fassler also reviewed reports by Dr. Beyer, a defense expert, and by Dr. William Meadows, an expert for the State.

Dr. Fassler opined that at the time of the two interrogations, given the totality of the circumstances and Defendant's background, Defendant was not able to fully comprehend, understand, or interpret the Miranda warnings, or appreciate the consequences of the decisions he was making. Dr. Fassler explained that at the age of twelve, Defendant would have been at the earliest stages of adolescent brain development, and therefore, his executive functioning would have been under-developed. Dr. Fassler stated that Defendant's executive functions were further impaired due to his exposure to stress, abuse, trauma, and violence.

Dr. Fassler opined that even under the best of circumstances, it would be difficult for a twelve-year-old to understand Miranda warnings and the implications of waiving Constitutional rights. In Defendant's circumstances, Dr. Fassler stated there were many additional factors which compromised his ability to understand and appreciate the consequences of waiving his rights. Specifically, stress, sleep deprivation, his history of abuse, his expressive and receptive language deficits, and his learning disabilities impaired Defendant's appreciation.

Dr. Fassler stated that Defendant's understanding would have also been impaired because of how the detectives administered the warnings. Dr. Fassler stated that the warnings were administered quickly and orally and that it is more difficult for young people to understand when information is presented orally. Dr. Fassler opined that one cannot gauge a child's understanding of Miranda warnings without having the child explain their understanding of each right.

Further, Dr. Fassler testified that Defendant's confusion was evident, specifically with regard to the June 23, 2011 interrogation, where he asked about the rules on the paper and the rights being between him and the Detective. Dr. Fassler also testified that when he met with Defendant, Defendant still had significant confusion regarding legal terms.

B. Opinion of Dr. Marty Beyer

Dr. Beyer is a clinical psychologist and juvenile justice/child welfare consultant and was retained for the purpose of assessing Defendant's ability to comprehend Miranda warnings. Dr. Beyer interviewed Defendant for thirteen hours at the juvenile detention center and saw Defendant again a few weeks prior to the evidentiary hearing. Dr. Beyer interviewed Defendant's mother and aunt, as well as Defendant's detention center teacher, counselor, and unit staff. Dr. Beyer also reviewed Defendant's school records, DCF records, the DVDs of both interrogations, and the reports

prepared by Dr. Fassler and Dr. Meadows.

At the time of Dr. Beyer's interview of Defendant, she found him to be an emotionally fragile twelve-year-old. Dr. Beyer stated that Defendant was highly anxious, especially when talking about his home life. Dr. Beyer testified that Defendant was emotionally immature for his age. Dr. Beyer also observed immature thinking on the part of Defendant, noting that he often could not see more than one choice and that he had difficulty comprehending the outcomes of his actions.

Dr. Beyer opined that Defendant was unable to knowingly, intelligently, and voluntarily waive his rights during both the March 15, 2011 and the June 23, 2011 interrogations. According to Dr. Beyer, Defendant's immature thinking impaired his comprehension of the Miranda warnings. Dr. Beyer testified that Defendant, during the March 15, 2011 interrogation, could only see one option and did not believe that he could say no to the police. Dr. Beyer stated that, in addition, Defendant did not understand the importance of the interview and could not look ahead to see how the interview might be used against him in future court proceedings. Dr. Beyer stated that Defendant, in the June 23, 2011 interrogation, did not have a future perspective about what might happen after the questioning.

Dr. Beyer testified that certain stressors can reduce a young person's maturity of thought, and Defendant was subject to the stressors of being interviewed in the early morning hours with lack of sleep and of being in isolation for a long period of time. Dr. Beyer also testified that trauma can impact development in children and interfere with all aspects of a child's functioning. Dr. Beyer stated that Defendant experienced a tremendous amount of trauma in his life, the effects impacting his maturity, and therefore, his ability to comprehend Miranda warnings.

Further, Dr. Beyer opined that due to his cognitive impairments, Defendant could not

understand Miranda warnings that were read aloud quickly and without explanation. In interviewing Defendant, Dr. Beyer found that Defendant could explain the meanings of some of the words in Miranda, but that he had difficulty with abstract thinking, which affected his ability to define a word like "right." Dr. Beyer testified that due to his impairments, Defendant could not understand his Miranda rights.

Dr. Beyer believed that Defendant's contact with lawyers in between the two interrogations did not improve his capacity to understand the warnings. Dr. Beyer explained that presence in court did not indicate comprehension. Dr. Beyer also testified that Defendant told her he had not learned anything more about his rights between the two interrogations. Additionally, when Dr. Beyer interviewed Defendant in January 2012, it was her opinion that Defendant still did not understand his Miranda rights. Finally, Dr. Beyer stated that Defendant's questions to Detective Perez, posed at the end of the June 23, 2011 interrogation, reflect that he did not comprehend that his statements could be used in court.

The March 15, 2011 pre-*Miranda* statement and custody determination

"A person is in custody if a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest." Ramirez v. State, 739 So. 2d 568, 573 (Fla. 1999). "The proper inquiry is not the unarticulated plan of the police, but rather how a reasonable person in the suspect's position would have perceived the situation." Id. (quoting Davis v. State, 698 So. 2d 1182, 1188 (Fla. 1987)). There are four factors that provide guidance to determine whether a reasonable person would consider himself to be in custody:

1) The manner in which police summon the suspect for questioning; 2) The purpose,

> place, and manner of the interrogation; 3) The extent to which the suspect is confronted with evidence of his or her guilt; 4) Whether the suspect is informed that he or she is free to leave the place of questioning.

Ramirez, 739 So. 2d at 574. Further, a child's age is relevant to the objective custody analysis. J.D.B. v. North Carolina, 131 S.Ct. 2394, 2403-2408 (2011). Thus, this Court must determine whether a reasonable twelve-year-old in Defendant's situation would have believed he was in custody.

Defendant was left unsupervised at home, with his younger five-year-old brother. Officer Devereaux picked up Defendant and his brother at their residence. The only available seating in Officer Devereaux's patrol car was the backseat. Therefore, Defendant and his brother were placed there. Defendant and his brother were not handcuffed and were not subject to a pat-down.

Once they arrived at the PMB, Defendant and his brother were taken through a public entrance to the waiting room area of the homicide office. This area is one with comfortable seating and magazines. While Defendant was not free to leave the homicide office because he was an unsupervised juvenile and the DCF had been called to determine his placement, he was free to move around the waiting area, and the door to this area remained open. Detectives Soehlig and Houghland then moved Defendant to an open office area of the homicide division so they could question Defendant as a witness.[2] Defendant was removed from the waiting area because it was crowded, and the open office area to which he was moved was within sight of the waiting area where his siblings remained. Defendant was not placed in an interrogation room. Moreover, Detective Soehlig did not confront Defendant with evidence of his guilt, but did specifically ask if Defendant's mother did something to D.G.

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[2]This Court recognizes that the subjective views of the Detectives are irrelevant.

Under these circumstances, this Court finds that a reasonable twelve-year-old would not think that his freedom of action was curtailed to a degree associated with actual arrest. As such, no Miranda warnings were required to be administered, and Defendant's statements are admissible.

The March 15, 2011 post-*Miranda* statements to Detective Soehlig and Defendant's mother

"[T]he requirement of giving Miranda warnings before custodial interrogation is a prophylactic rule intended to ensure that the uninformed or uneducated in our society know they are guaranteed the rights encompassed in the warnings." Davis, 698 So. 2d at 1189. It is the State's burden to prove that the waiver of Miranda rights was knowingly, voluntarily, and intelligently given. Ramirez, 739 So. 2d at 575. When the suspect is a juvenile and waives his Miranda rights, the State bears a "heavy burden" to prove that the rights were knowingly and voluntarily waived. Id.

The determination of whether an individual validly waives his Miranda rights is subject to the following inquiry:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421 (1986) (citations omitted). There are five factors which aid the Moran analysis: 1) The manner in which the Miranda rights were administered, including any cajoling or trickery; 2) The suspect's age, experience, background and intelligence; 3) Whether the suspect's parents were contacted and the juvenile was given an opportunity to consult with his

parents before questioning; 4) Whether the questioning took place in the station house; and 5) Whether the interrogators secured a written waiver of the Miranda rights at the outset of the interrogation. Ramirez, 739 So. 2d at 576. This Court finds the second prong of the Moran analysis to be most applicable in the instant case, that is, whether Defendant waived his rights fully knowing the nature of the rights being abandoned and the consequences of the decision to abandon them. Also particularly applicable to the instant analysis is Defendant's age, experience, background, and intelligence.

The expert testimony at the evidentiary hearing established that Defendant did not waive his rights with a full awareness of the nature of the rights being abandoned and the consequences of the decision to abandon them. Dr. Fassler testified that even under the best of circumstances, it would be difficult for any twelve-year-old to understand Miranda warnings and the consequences of waiving their rights. Dr. Fassler stated that there were many additional factors which compromised Defendant's ability to appreciate the consequences of waiving his rights. These additional factors included stress, sleep deprivation, a history of abuse, expressive and receptive language deficits, and learning disabilities. Ultimately, Dr. Fassler opined that given the totality of the circumstances and Defendant's background, Defendant was not able to fully comprehend, understand, or interpret the Miranda warnings. Moreover, Defendant did not appreciate the consequences of the decisions he was making.

Dr. Beyer also opined that Defendant was unable to knowingly, intelligently, and voluntarily waive his Miranda rights. Dr. Beyer stated that Defendant's comprehension was impaired by his immature thinking, that Defendant did not understand the importance of the March 15, 2011 interview, and that Defendant could not see how it could be used against him in future court

proceedings.

At the time of the post-Miranda interrogations during the early morning hours of March 15, 2011, Defendant was a twelve-year-old who had no prior experience with the legal system. When Detective Soehlig first began to review the Constitutional Rights Form with Defendant, he indicated that he did not understand the right to remain silent. Detective Soehlig then explained, "Okay. This means that you don't have to talk to me when I talk to you and you don't have - - you don't have to tell me anything and you don't have to say anything, but you can say something. It just tells you that you don't have to." (Evidentiary Hr'g. tr. at 123, June 28, 2012.) From that point on, Defendant indicated that he understood each of the remaining rights. During the interrogation, Defendant appeared alert and responsive. At no point in time did Detective Soehlig believe that Defendant did not understand what he was being asked about. While Defendant may have appeared responsive and intelligent during the interrogation, this Court cannot ignore the fact that Defendant was a 12 year-old child with no knowledge of the legal system. Moreover, this Court cannot ignore expert testimony that Defendant was unable to fully comprehend the Miranda warnings or appreciate the consequences of waiving his rights.

This Court finds that the State did not meet its burden of establishing that Defendant's rights were knowingly and voluntarily waived. This Court further finds that Defendant did not completely comprehend the Miranda warnings or the consequences of waiving his rights. Therefore, the post-Miranda statements Defendant made to Detective Soehlig and his mother on March 15, 2011 must be suppressed.

The June 23, 2011 statements to Detective Perez

On the morning of June 23, 2011, Defendant was taken from the adult detention facility to

the sex crimes office of the PMB, for the purpose of an interview. Prior to interviewing Defendant, Detective Perez did not contact Defendant's mother because she was charged in the same incident and Detective Perez did not contact Defendant's father because she was aware that his father had never been involved in his life. Nor did she contact Defendant's lawyer, attorney ad litem, or legal custodian.

Once Defendant was placed in the interrogation room, Defendant can be seen looking around the room and stating, "I wonder where the camera is." Detective Perez entered the room and began to review the Constitutional Rights Form with Defendant. Detective Perez read each right verbatim, and after each statement, asked Defendant if he understood. Defendant responded affirmatively each time, either saying "yeah," or nodding his head. Detective Perez testified that at no point in time did Defendant not seem to understand the words she was telling him. Throughout the interrogation, Defendant appeared to understand the questions asked and was able to appropriately respond to the questions. At the conclusion of the interrogation, Defendant posed a question to Detective Perez regarding his Miranda rights.

The State argues that as Defendant had more exposure to the criminal justice system at this point in time, Defendant was able to comprehend the Miranda warnings. The State points to the fact that Defendant had already been through the March 15, 2011 interrogation, as well as the fact that Defendant was assigned legal counsel. Defendant met with his lawyers on multiple occasions, and they appeared with Defendant in both adult and juvenile court. Defendant's lawyers had met with him as recently as the day before the June 23, 2011 interrogation. Seemingly at this point in time, Defendant had a better understanding of the Miranda rights and the implications of waiving those rights based on his experience in the legal system. Indeed, Defendant's statement at the beginning

of the interrogation - "I wonder where the camera is" - supports the State's argument that Defendant had more insight into the legal process.

Nevertheless, the experts unanimously agreed that during the June 23, 2011 interview Defendant was unable to comprehend the Miranda warnings or appreciate the consequences of waiving his rights. Dr. Fassler specifically testified that Defendant did not have a better understanding of legal terms at the time of the second interview and that Defendant still had significant confusion about legal terms. Dr. Beyer explained that Defendant's contact with his lawyers and his presence in court was not indicative of his comprehension. Dr. Beyer also testified that when she interviewed Defendant in January 2012, Defendant still did not understand his Miranda rights.

This Court finds Defendant's question posed to Detective Perez at the conclusion of the interrogation troublesome. Defendant asked her: "Well, was the - - the - - rules on paper actually will - - the rights were between you and me?" (Evidentiary Hr'g. tr. at 375, June 29, 2012.) This question clearly indicated that Defendant did not completely comprehend his rights. Also, both experts testified that this question makes Defendant's confusion evident.

Therefore, this Court finds that the State has not met its burden of establishing that Defendant's rights were knowingly and voluntarily waived. This Court additionally finds that at the time of the June 23, 2011 interrogation, Defendant did not comprehend the Miranda rights, or the consequences of waiving them. Thus, Defendant's statements to Detective Perez must be suppressed.

Based on the foregoing, it is:

ORDERED AND ADJUDGED that:

1. Defendant's Motion to Suppress Statements of June 15, 2011 is **GRANTED, in part**, and **DENIED, in part.**

2. Defendant's pre-Miranda statements made to Detectives Soehlig and Houghland on March 15, 2011 are admissible.

3. Defendant's post-Miranda statements made to Detective Soehlig and his mother on March 15, 2011 must be suppressed.

4. Defendant's Motion to Suppress Statements of June 23, 2011 is **GRANTED.**

DONE AND ORDERED in Chambers in Jacksonville, Duval County, Florida this 7 day of August, 2012.

Mallory D. Cooper
CIRCUIT COURT JUDGE

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Case Nos.: 16-2011-CF-06222-AXXX; 16-2012-CF-00136-AXXX

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2011-6222

DIV.: CR-D

FILED
DEC 05 2011
CLERK CIRCUIT COURT

STATE OF FLORIDA

VS.

CRISTIAN FERNANDEZ
_____ /

AMENDED MOTION TO APPOINT GUARDIAN AD LITEM

COMES NOW, DEFENDANT, CRISTIAN FERNANDEZ, by and through his undersigned counsel the Public Defender for the Fourth Judicial Circuit of Florida, and hereby moves this Honorable Court to appoint a guardian ad litem to serve as his parental and counselor to serve as a learned intermediary between Cristian and the attorneys representing him in this criminal prosecution. In support of this motion Cristian, by counsel, states:

1. Cristian is a twelve-year-old boy indicted as an adult on June 2, 2011 with one count of first-degree murder and one count of aggravated child abuse arising from the death of his two-year-old half brother David Galarraga.
2. Cristian has been in custody since March 15, 2011, in the Duval County Jail from March15, 2011 to June 3, 2011, and in the juvenile detention center since then.
3. Cristian's mother, Biannela Susana, was charged with aggravated manslaughter of a child, also arising from David Galarraga's death, and has been held in the Duval County Jail since April 2, 2011.

EXHIBIT
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4. [redacted]

5. [redacted]

6. [redacted]

7. This Court has broad discretion and inherent authority "to enter any order appropriate to a child's welfare." *B.Y. v. Dep't of Children and Families*, 887 So. 2d 1253, 1256 (Fla. 2004). The Court's inherent power includes the equitable power to appoint a guardian ad litem. *Peppard v. Peppard*, 198 So. 2d 67, 69 (Fla. 3rd DCA 1967).

8. Cristian is a 12 year old child charged as an adult with first degree murder who must be engaged with his defense counsel in intense pretrial proceedings and trial in the coming weeks, or alternatively involved in plea negotiations. He must not be required to continue in these unique circumstances to make grave decisions without a guardian ad litem to serve as parental advisor, next friend, and intermediary with his defense counsel.

9. Because the role of guardian ad litem for Cristian will be to ensure that he and his defense counsel communicate fully and with complete understanding as decisions are

made in this criminal proceeding or in plea negotiations, those communications shall be protected by the attorney-client privilege. See § 90.502(1)(c), F.S.; *Gerheiser v. Stephens*, 712 So.2d 1252, 1254-55 (Fla. 4th DCA 1998).

10. The undersigned has spoken with Attorney Hugh Cotney, who has agreed to the appointment as Cristian's guardian ad litem.

WHEREFORE, the undersigned attorney respectfully requests this Honorable Court enter an order appointing a guardian ad litem for Defendant, Cristian Fernandez, with attorney/client privilege afforded to communications therein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Amended Motion To Appoint Guardian Ad Litem has been hand delivered to the Office of The State Attorney, Jacksonville, Florida 32202, this 5th Day of December, 2011.

Respectfully submitted,

Matt Shirk, #0195911
Public Defender

15-002R

ORIGINAL

JEANNE M. SINGER
CHIEF ASSISTANT STATE ATTORNEY

BRIAN S. KRAMER
EXECUTIVE DIRECTOR

WILLIAM P. CERVONE
STATE ATTORNEY
EIGHTH JUDICIAL CIRCUIT OF FLORIDA
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GAINESVILLE, FLORIDA 32601

TELEPHONE (352) 374 – 3670

PLEASE REPLY TO:

January 2, 2015

FLORIDA
COMMISSION ON ETHICS
JAN 09 2015
RECEIVED

Linda M. Robison, Chair
Florida Commission on Ethics
P. O. Drawer 15709
Tallahassee, FL 32317-5709

Dear Ms. Robison:

At the direction of the Duval County Grand Jury, I am enclosing for you a copy of a Presentment returned by that body in December of 2014 regarding Public Defender Matt Shirk of the Fourth Judicial Circuit.

Please note the third of the Final Recommendations of the Grand Jury contained on Page 15 of this report, which requests that the Florida Commission on Ethics be provided with the Presentment and review certain matters contained therein.

With the issuance of this Presentment, the Grand Jury's term has expired and it has no further role in this matter. I am, however, available to the Commission for any inquiry you might have or to provide any other information that might be appropriate. You are welcome to have anyone who might need to do so contact me directly.

Sincerely,

William P. Cervone
State Attorney

WPC/am

Enclosure

EXHIBIT
tabbies
C
#19-3434EC

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

IN RE: INVESTIGATION REGARDING ALLEGED MISCONDUCT OF MATT SHIRK, PUBLIC DEFENDER OF THE FOURTH JUDICIAL CIRCUIT OF FLORIDA

PRESENTMENT OF THE GRAND JURY

The Spring Term, 2014, Duval County Grand Jury, having been convened by the Court and instructed as to its duties on May 5, 2014, and having by the required vote of 12 or more of its members elected to conduct an investigation into alleged misconduct of Matt Shirk, Public Defender of the 4th Judicial Circuit, has inquired into matters related thereto. In furtherance of that, the Grand Jury met and heard testimony on June 24, 2014 July 17, 2014, August 21, 2014, September 18, 2014, October 23, 2014, November 13, 2014, and deliberated on December 16, 2014.

In order to complete its work because it could not do so within its normal term, as the end of that term approached the Grand Jury, again by the required vote of its members and through the State Attorney, requested that its term be extended. That request was timely granted by order of the Hon. Donald R. Moran, Jr., Chief Circuit Judge of the 4th Judicial Circuit.

For the reasons set forth in this Presentment, and after full deliberation and by the required vote of its members, the Grand Jury has chosen to return this report to the community of its findings of fact, conclusions and recommendations without making any Indictment.

BACKGROUND

Beginning in August of 2013, a series of media reports were published regarding Matt Shirk, the elected Public Defender for the 4th Judicial Circuit. These centered on a variety of areas of alleged misconduct, some potentially criminal in nature and others clearly non-criminal but important to the public trust invested in elected officials and their offices. Many of these latter matters center on the personal conduct of Shirk and while the Grand Jury believes that the personal life of public figures should be largely a private matter, when those matters interfere with or undermine the ability of a public official to fairly, effectively and professionally run his office, create a perception of such in the public eye, or call into doubt the functioning of a public office, they become subject to public scrutiny. Indeed, in its charge to the Grand Jury, Chief Judge Moran instructed the Grand Jury that it has the authority and obligation to "investigate public offices to determine if they are being conducted according to law and good morals" as

well as "the power to investigate the conduct of public affairs by public officials and employees, including the power to inquire whether those officials are incompetent or lax in the performance of their duties," and that "if there are reasons to do so" the Grand Jury "should not hesitate to call any public official" before it. Upon making such an inquiry into matters of governmental administration, the Grand Jury should "when appropriate, make presentment concerning ... general conditions." The Grand Jury is further aware that the Supreme Court of Florida has said that a Grand Jury has the right to express the views of the citizenry it represents, that a society such as ours in which we are governed by representative officials requires citizen review of public action, and that public review and comment regarding elected officials fosters an understanding and respect for the government, which this Grand Jury believes to be an important function.

The vital role of the Public Defender's Office in the criminal justice system, the importance of the Office's integrity, and need for public confidence in the performance of official duties demanded a further inquiry by this Grand Jury. The Public Defender's Office represents indigent defendants at virtually all levels of the criminal justice system, and while firm statistical data is difficult to obtain those individuals constitute a large percentage of all persons who appear before the criminal courts. Both those defendants and the community must be confident that they are well and adequately represented by an office that is free from accusations that would cast doubt on or bring ridicule upon its representation of indigent defendants or the fundamental fairness of the criminal justice system as a whole.

Throughout its inquiry, the Grand Jury has been advised and assisted by State Attorney William P. Cervone and Assistant State Attorney Adam M. Urra of the 8th Judicial Circuit, headquartered in Gainesville. Mr. Cervone and Mr. Urra were assigned that role by the Governor upon the withdrawal of 4th Judicial Circuit State Attorney Angela Corey from the matter, which was appropriately done to avoid any appearance of impropriety or improper influence because of the close working relationship between the 4th Circuit's State Attorney's Office and Public Defender's Office. The 4th Circuit State Attorney's Office has had no involvement with or input into this inquiry or Presentment.

As a final preliminary matter, the Grand Jury recognizes that the origin of this inquiry, that being media scrutiny and reports regarding Shirk and his conduct, is not the norm but is in no way inappropriate. In most cases, the Grand Jury's work follows a law enforcement investigation that has resulted in an arrest or otherwise caused a case to be brought before the Grand Jury. There has been no law enforcement investigation in this matter, everything that was considered having been brought forth by the assigned State Attorney or at the Grand Jury's request. In so doing, the Grand Jury has been mindful of media interests and possible motivations and has striven to avoid any taint that some might ascribe to such. The Grand Jury has also considered the competing motives and credibility of many of those involved while coming to its conclusions, which are based solely on the Grand Jury's collective assessment and determination as to all that it has heard. Finally, the Grand Jury notes for all who read this presentment that it has chosen not to address other matters that have been publicly discussed based upon lack of evidence of impropriety or illegality.

FINDINGS OF FACT

Based on the testimony that it has heard as well as on various documents and other materials it has reviewed, the Grand Jury finds the following facts to be established.

Matt Shirk was first elected Public Defender of the 4th Judicial Circuit in November of 2008 and took office in January of 2009. The Fourth Judicial Circuit includes Clay, Duval, and Nassau Counties and The Public Defender has his headquarters office in Duval County, as do other criminal justice agencies such as the Circuit Court and the State Attorney. Shirk was re-elected to a second term in November of 2012, and that term of office began in January of 2013. At the time of his first election in 2008, Shirk was 35 years of age and had never previously held public office. While he had worked for several years as an Assistant Public Defender and as a private practitioner, at the time of his election he had not managed an office or staff even remotely approaching the size of the 4th Judicial Circuit Public Defender's Office. These circumstances are relevant to the Grand Jury and germane to the conclusions it has reached.

Shirk faced a problematic transition when he first took office in that, while he had worked in the office for several years he had never been involved in management or budget issues. He also was personally inexperienced in handling many of the more sophisticated types of cases the office routinely is charged with, which was exacerbated by the resignation or termination of many senior staff attorneys who had that institutional knowledge and ability. A drastic change in office culture occurred as Shirk implemented changes he believed were necessary, reaching even to such relatively mundane matters as attire and office decorum. More significant issues such as hiring and management policies and procedures were also addressed. For the most part, despite some conflicts normally caused by any such transition, those matters were worked through over the course of his first term in office. By the time his second term of office began, however, Shirk himself began to exhibit a different attitude towards his job that was characterized by a greater interest in his personal interests than in the office as a whole. This was noticed especially by several of his administrative and leadership staff.

Shirk and his administrative staff established procedures to be used for employment screenings and hiring. When a position had to be filled externally a committee was appointed to review applicants, conducted initial interviews, and make a recommendation. A part of this process also included routine background screening. The final pool of qualified applicants would be presented to Shirk for a decision. In and of itself, the process provided for an appropriate and systemic approach that would seemingly result in a fair and open process untainted by any illegal considerations such as race, age or gender bias. A process for employee evaluations was also in place and included periodic reviews and appropriate stepped corrective actions such as probationary periods prior to termination when necessary.

During Shirk's first term, the Public Defender's Office re-located to the Jake Godbolt City Hall Annex building. Renovations to that building in order to accommodate the Public Defender's Office were paid for by the city, and during that process a request was made by Shirk's staff for inclusion of a private bathroom and shower in Shirk's personal office. The city did not approve that line item expense. Nevertheless, and while the line item for this was removed from the budget, Shirk and his senior staff included the private bathroom and shower by re-directing funding approved for other areas of the renovation to cover the expenses involved. No additional money was spent to accomplish this, but money was used for purposes that it was not intended for.

The Godbolt building, as do other city buildings, utilizes an electronic card key access system that not only allows entry by authorized personnel but also maintains a record of the use of those card keys. All buildings owned by the City of Jacksonville use this same security system. The system is set up and maintained by the city, with each organization having access to the system for their particular needs to their particular building. Testimony provided by Information Technologies personnel described it as a hub/spoke system, where the city maintains the central system (the hub) and each organization has limited access only to their building, like spokes on a wheel.

Data is recorded on a "live" server, maintained and controlled by the city, for 90 days. Any alteration using the security software program can affect data recorded within that 90 day period. All information older than 90 days is consolidated and archived in secure servers also maintained and controlled by the city. Alterations cannot affect archived data older than 90 days.

The Public Defender's Office had security software which allowed them to grant individuals key card access at their discretion. Each individual would be assigned a particular card, with a number associated within the system to that card. The software permits an authorized user to control any given cards level of access, to add a user, inactivate a user's cards, or delete the card from the system. The program also allows users to run multiple types of searches. One such search is a global master list to determine who has a security card granting access to a particular building. The system is also able to track the use of a particular card during a particular time period. Both of these searches are generally run by name.

When a card is inactivated, the name of the user remains associated with the keycard number, that particular keycard simply no longer functions. A search by name would still locate the user in the system, as well as recover the record of card usage. Normal procedure allowed for a user's card to be deactivated upon leaving employment at the Office of the Public Defender.

The system also permits cards to be deleted from the system. Such an action completely disassociates a user's name from that card and its number. Deleting the card results in the inability to search for the user's name performing either a global or card use search. A particular card number may still be searched, but it will no longer be associated

in the "live" server with the user's particular name. Records older than 90 days will be archived, and not affected by a user deleting the card in the system.

In short, deletion removes that prior record from any but the most specific of searches through archived records. In essence, if a record is deleted it would be impossible to search past use by name, although that could still be done by the specific card number assigned to a name. A name search would show nothing, implying no access or entry under that name.

The Public Defender's Office trained two individuals to use the security software system in question. One was an investigator and the primary operator of the system. The other was an administrative support staff who had only recently been trained in operating the software, had limited experience with it, and by her own testimony described herself as unfamiliar and uncomfortable with it.

Three female clerical level employees were hired during 2012 and 2013, and these women ultimately became the flashpoint for much of what has happened. The Grand Jury finds that none of these women has been at fault in any way. Despite considerable concerns for their privacy unfortunately their identities largely having been made a part of the public dialog, and must by necessity be included herein to avoid confusion. The Grand Jury regrets that these women may be once again thrust into the public spotlight, but views this as one more in a long line of consequences from Shirk's irresponsible behavior.

The first, Tiffany Ice, was employed in April of 2012 through normal channels but apparently as a favor to a political supporter of Shirk's. She was initially a part time employee and despite concerns with her work performance by the Spring of 2013 she had been transferred to a full time position. She was, however, on a probationary status, again for issues related to her job performance, during May and June, times that became relevant.

The second, Kaylee Chester, was hired completely out of the normal procedures adopted by Shirk. Ms. Chester was targeted for employment by Shirk based on her physical appearance and a photo or social media posting. Shirk directed that she be located and he then interviewed and hired her himself without any application paperwork, and simply informed others that she would begin work on a specific day. Ms Chester was hired for a newly created position even she did not believe she was fully qualified for it. Office policy required employees to undergo a drug screening prior to beginning employment. Ms. Chester finally participated in screening as an afterthought, several weeks after she began work. Per testimony of Ms. Chester's supervisors and co-workers, her work product during her relatively brief period of employment, approximately six weeks, was good.

The third, Krystal Coggins, was hired out of the established hiring policy, this time for an existing vacancy. Shirk inquired of Ms. Chester whether she had any friends who were seeking a job, and Ms. Chester suggested Ms. Coggins with whom she was

personally acquainted. Shirk again interviewed and hired this woman himself, without the normal application or screening process. Ms. Coggins was employed for only two weeks but her work but her work product was universally acknowledged by her supervisors as being very good.

From the beginning of Ms. Chester's employment, Shirk was noticeably familiar and friendly with her. His attentiveness far exceeded the norm for employer-employee relationships in the work place. While her work station was not immediately adjacent to his office, he would frequently spend time at her desk socializing. He would take coffee breaks with her. He would take her to lunch outside the office. Shirk would bring Ms. Chester along on office visits to outlying counties. It is unclear what role Ms. Chester filled on such visits, as this was unrelated to any professional responsibility she had. This relationship was unique, and unlike any he shared with other employees. Shirk would suggest her participation in outside activities related to the office such as acting as a scribe for the Public Defender's Association, a statewide organization of elected Public Defenders of which Shirk was an officer. Shirk further suggested Ms. Chester accompany him to Public Defender Association meetings. These meetings were to be held between six and twelve times a year across the state and frequently required overnight stays. As the scribe Ms. Chester was to record minutes of those meetings, although prior to her employment neither Mr. Shirk nor any other Public Defender apparently brought along an employee solely for that purpose. Despite Shirk's suggestion, her employment was terminated prior to such a trip occurring. Shirk would engage in verbal, e-mail and text banter that became flirtatious if not openly sexually suggestive. The extent of Shirk's attention to Ms. Chester provoked considerable office gossip, to the point where several of his closest management employees confronted and cautioned him. At least one longtime employee was moved to engage him in a tearful confrontation questioning his actions and motives. Senior employees received complaints from others that Shirk's relationship was inappropriate and distracting. Shirk was at the same time although to a lesser extent engaging in the same type of behavior with Ms. Ice, especially with suggestive and inappropriate text messaging. One such example was an electronic card sent by Mr. Shirk to Ms. Ice that read "I think if we had sex, there would be very little awkwardness after".

The testimony heard by the Grand Jury clearly establishes that Shirk kept alcoholic beverages in his personal office during this time. On at least one occasion he shared those with Ms. Chester and Ms. Ice. This occurred late on an afternoon at the end of May, 2013, close to the end of or perhaps after formal office hours. Section 154.107(a) of the Jacksonville city code provides that it is unlawful for anyone to "serve or consume" alcoholic beverages in, among other places, a city building. Shirk had from early, if not the beginning of his tenure, kept in his personal office an ornamental globe that functions as a sort of bar, including by holding alcoholic beverages. On the occasion in question, Chester and Ice were in Shirk's office for totally social and non-work related reasons. Each was provided an alcoholic drink by Shirk. A senior employee who happened to walk in seeking something work related from Shirk was immediately made uncomfortable by the conversation and the alcohol use. Part of this conversation included Mr. Shirk offering use of his private bathroom and shower to Ms. Chester. The

senior employee later had a private conversation with Shirk regarding his conduct and professionalism.

Shirk's personal relationships with these women reached a boiling point in on June 13 of 2013, causing an unpleasant, disruptive and very public confrontation between his wife and Ms. Ice. From the testimony it has heard, the Grand Jury finds that Shirk's overly familiar behavior with these young women created at least the appearance of and likely the belief that he was engaging in extra-marital relations with at least one of them. While there is no testimony to show that to have been true, whatever was happening certainly created a toxic office environment in which many people were at least concerned if not offended by Shirk's behavior. Inevitably, the rumors and talk about his behavior reached Mrs. Shirk and she observed certain text messages on his phone. A heated argument ensued during which she destroyed his office cell phone. The next day, when Shirk was not at work, Mrs. Shirk arrived at the Public Defender's Office, apparently gaining access through a card key that had been issued to her even though she was not an employee, and engaged in an angry confrontation with Ms. Ice. Ms. Shirk ordered Ms. Ice into Shirk's office, sat down at his desk, and informed Ms. Ice that she would either have to resign or she would be summarily fired.

Shirk ordered all three women's employment be terminated. This was done solely because Shirk's wife delivered an ultimatum to him that the women were to be fired, or she would leave him. Shirk relayed this directive to Ron Mallet, his Chief of Staff, who summarily and without explanation to them fired Ms. Chester and Ms. Coggins as Shirk had ordered. Ms. Ice remained employed, and was placed on a period of probation, a decision based on perceived poor work performance and not related to Ms. Shirk's actions. Mallet did not believe Ms. Ice's immediate termination was appropriate under those circumstances, and suggested to Shirk that she be retained for the duration of that probationary term. However, Ms. Ice wasnot allowed to complete that probationary period, instead being fired a few days later as Shirk's wife had demanded of him. On June 16, 2013 Shirk authored an email to Mallet ordering him to terminate Ms. Ice as well. In August of 2013, Shirk issued a statement claiming that "[A]ny employment decisions are based on ***well-established office policy*** which takes into consideration budgetary and staffing needs." (italics added) This is clearly not so, at least as applicable to these three women, each of whom was fired at Shirk's direction purely for the personal motive of trying to solve the marital problems that he himself created.

In mid-August 2013 Mallet communicated with Shirk about cancelling Mrs. Shirk key card, which Shirk agreed should be done. As previously stated, there were two employees at the Public Defender's Office trained to use the key card security software. Mallet chose to ask the less experienced employee who had expressed unfamiliarity with the system to cancel Ms. Shirk's keycard, along with that of the card given to the couple's young son. Mallet's decision to utilize this far less experienced employee with no training or background in security or familiarity with the program is puzzling at best, and speaks to the lack of care, comprehension, and attention to detail he displayed throughout this matter. Regardless, this employee did as Mallet instructed, initially deactivated Ms. Shirk's card, and returned to Mallet to see if this was sufficient. Mallet

demanded again that she be removed from the system. Records obtained from the security system indicate this employee then ran a global access report, which still would have shown Mrs. Shirk as having a card, albeit deactivated and useless. Only then did the employee go back into the system and delete Ms. Shirk's card altogether. Shortly after Shirk's son's card was deleted as well. While there is a suggestion that this was done to prevent another such episode, the time gap between Mrs. Shirk confrontation with Ms. Ice on June 13, 2013 and the deletion of her card key data on August 14, 2013 is inconsistent with that reason. Of greater likelihood was that beginning in mid-July 2013, and intervening between the two events, was the onslaught of media and other public records requests, including about building access. Regardless, Mallet had the deletion processed by another employee despite her concern that doing so was not appropriate, which she did only because Mallet, her supervisor, directed her to do so. Whether Mallet understood that deleting Ms. Shirks card would alter a public record maintained on the 90 day server is unclear, but this Grand Jury finds it highly unprofessional and concerning that an employee with a position such as Chief of Staff lacked a basic understanding of such an important system that maintains records protected under state law. This is another reflection on the poor training, systems, and safeguards instituted by Mr. Shirk and his administration, all of which practically invited incidents such as this.

While all of this was happening during the summer months of 2013, Shirk was by many accounts simply unavailable to and uninvolved in the office. In part he was on scheduled vacation leave. In part he was out of the office but on office business. In larger part, he was absent because he was attempting to repair his marriage. Regardless of the specifics, at least some key supervisors did not feel that they could reach Shirk for decisions or direction that he needed to provide as the elected head of the office. Some supervisors and management level employees had already noticed that since the beginning of his second term Shirk had become less engaged and more focused on his personal interests than on office management. In particular, when rumors and innuendo were flying Shirk never effectively communicated to his office or staff the nature of what happened or ensured that the office would continue on with business as scheduled, despite his and the office's reputation being consistently on display in local media. This fostered an environment where people had continual concern for their employment, as well as the employment of their colleagues and supervisors. That situation reached a head during this time when the office was most in need of leadership. Instead, there was none or close to none, at least from Shirk, as the public exposure that eventually culminated with the Grand Jury's involvement built.

The Cristian Fernandez Case

The acts and events described above are concerning in their own right but there is a far more serious concern reflecting a lack of professional behavior that causes the Grand Jury to question the ability of Shirk to conduct public affairs as they should be. The State of Florida requires every attorney to take an oath upon admission to the Bar that in part requires the attorney to swear, "I will maintain the confidence and preserve inviolate the secrets of my clients." It is the failure to uphold this oath that the Grand

Jury now concerns itself with. This centers on his representation of Cristian Fernandez, a 12 year old (at the time) charged with murder in a case that became a community focal point in 2012. Throughout its inquiry, the Grand Jury has declined to consider various complaints brought to its attention from individuals represented by the Public Defender's Office who allege poor legal representation or mis-handling of their cases, believing that to be outside of the Grand Jury's charge and concluding that doing so would do no more than ratify second guessing from those with a perhaps unwarranted grievance. Other forums exist for that when it is appropriate. The Fernandez case, however, is different, not because of the stakes involved for that defendant but because of the direct involvement of Shirk and because of his actions and what they reflect regarding ethical mis-conduct on his part. It is important to remember in this regard that as the head of an agency that employs many new and inexperienced attorneys Shirk must set a standard by his own conduct for others to learn from and follow. For many, Shirk exists as the face of criminal defense in this city and community. Shirk's failure to abide by basic precepts of ethical conduct casts doubts and aspersions upon the competency of his office, in spite of the competent work of many attorneys in his employ.

As a predicate to what follows, the Grand Jury has reviewed provisions of the Florida Bar's Rules of Professional Conduct, which govern the conduct of all attorneys licensed to practice law in the state. Specifically, Rule 4-1.6, which relates to and is entitled Confidentiality Of Information, provides in pertinent part that "A lawyer must not reveal information relating to representation of a client except as [otherwise provided] unless the client gives informed consent." The Bar's commentary to this Rule states that "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information related to the representation." Other provisions of the Rules make it clear that this prohibition applies equally to a former client. "Informed Consent" is not a difficult concept and is explained by the Rules as denoting agreement after adequate information and explanation. In the case of a minor of such age as Fernandez, it seems axiomatic that informed consent must necessarily be given at least if not exclusively by the minor's guardian.

Again from the testimony it has received the Grand Jury finds the following facts to be established. In early 2011 Cristian Fernandez, a 12 year old child, was arrested for the murder of his younger brother. Due to his age Fernandez was initially retained in the juvenile justice system, and appointed an experienced assistant public defender to represent him. This assistant public defender soon approached Shirk about the nature of the case and his concerns about how the State Attorney's Office might proceed, but at this stage Shirk showed little involvement or interest.

The situation changed drastically when the Office of the State Attorney for the 4th Circuit exercised their discretion and indicted Fernandez as an adult for First Degree Murder, exposing the boy to a possible mandatory sentence of life in prison. Fernandez was remarkably young to be indicted for First Degree Murder, and the case drew a marked amount of local, national, and international attention.

In response to this news a group of experienced, qualified, and well respected private attorneys approached Shirk and the Public Defender's office to offer their considerable resources, expertise, and assistance to facilitate an effective and aggressive defense. This group of "private attorneys" offered their assistance for free, and expressed a willingness to operate solely in a background capacity. Shirk and the Public Defender's Office accepted this offer, and for a period of time the groups worked in relative harmony.

During this period, strategy meetings were held on a semi-regular basis at the Offices of the Public Defender. These meetings provided attorneys and staff the ability to discuss privileged material such as litigation strategy. During one such meeting a member of this "private group" raised concerns that members of a foreign documentary crew, a crew following the Fernandez case as part of a documentary highlighting juvenile justice in America, were present and had access to such litigation strategy sessions where privileged material would be discussed. Due to concerns over the disclosure of such privilege information, the meeting was stopped at the request of this private attorney.

In December 2011 Mr. Fernandez was appointed a Guardian Ad Litem by the court. This Guardian Ad Litem was to stand in a position of parental authority to Mr. Fernandez, and serve as an advocate for the best interests of the child. Shortly after, the Guardian Ad Litem filed a motion with the court requesting substitution of counsel, in which the Public Defender's Office would be replaced with the group of private attorneys. This transition was acrimonious, but the Court entered such an order authorizing substitution of counsel in February of 2012

Fernandez entered a plea in February of 2013 to multiple offenses and was sentenced. This was after a motion to suppress certain statements of Fernandez was granted, in large part because the Court found, based upon the testimony of several experts, that Fernandez's young age and mental development made him unable to understand fundamental legal principles such as his right to remain silent and right to an attorney. As a result, the Court found no such waiver could ever be knowing and voluntary.

Shortly after Fernandez entered a plea, and within the thirty day period which the Guardian Ad Litem was still appointed by the court to represent Fernandez, Shirk gave an interview with the aforementioned documentary crew. During the end of that interview Shirk made the following statement "Let me tell you what Cristian told me..." Shirk then proceeded to recount a version of events surrounding the crime that Fernandez disclosed to Shirk, in an apparent privileged capacity. This disclosure came to light when the documentary aired in July of 2014

It is clear Fernandez's statements, should they have actually occurred, were privileged communication to his attorney. The Grand Jury was not provided with any credible evidence, such as documents, notations, or memorandum that Fernandez ever authorized a waiver of attorney-client privilege. Further testimony indicated that there was a lack of any such notation in the file. Additionally, no attorney or Guardian Ad

Litem had been contacted by Shirk regarding a waiver of privilege or disclosure of privileged information. Testimony indicated that Fernandez denies waiving attorney client privilege.

While Shirk claims he did obtain some sort of waiver from Fernandez during the period of the Public Defender's representation, when Fernandez was a child, the Grand Jury does not find such testimony credible. Moreover, in a light most favorable to Shirk, even had such a waiver been obtained, it is unlikely such a waiver would be valid given Fernandez's age and the courts findings on a similar matter on the Motion to Suppress. Finally, it is inconceivable that an attorney of Shirk's experience and position would engage in such public disclosure of indisputably privileged information without consulting the child's legal guardians or attorneys, which did not occur.

Conclusions And Recommendations

Much if not all of what has come to the public's attention in terms of mis-conduct by Shirk at the Public Defender's Office can be traced directly to the failure of Shirk himself to abide by his own office policies regarding hiring and firing. It should go without saying that policies and procedures are only effective if followed. When the leader of an organization chooses to bypass established policies and procedures the message is inevitably sent to others that those policies and procedures are no more reliable or valuable than the paper they are printed on. When the reason for them being ignored is apparently for personal purposes, as the Grand Jury concludes happened with Shirk, the message is even more inappropriate. Not only did Shirk's actions call him and his office's reputation into question and reduce both to soap opera levels of courthouse and public gossip, but also they unfairly affected the lives of the three women involved directly. All three were terminated solely to allow Shirk to try to make amends to his wife for his inappropriate actions. While the Grand Jury appreciates Shirk's claim that he would always choose the preservation of his marriage over that of professional concerns, this Grand Jury notes that Shirk always had the option to resign in order to prioritize his stated concerns, but instead elected to terminate the careers of three women who had done nothing wrong, exposing them to considerable public embarrassment. One has initiated a law suit over her termination and while it is not within the Grand Jury's purview to comment on the efficacy of that case it is beyond dispute that at a minimum public resources and money must now be expended in defending that action, and more could be at risk should there be an ending to that suit that is adverse to the Public Defender's Office. An entirely avoidable lawsuit that puts the public purse at risk, contributes to the unraveling of office morale and public confidence in the Public Defender's Office, is intolerable. The fact that such a lawsuit serves as a time consuming distraction that may potentially take Public Defender's Office employees away from their legitimate business at the expense of the taxpayers is of particular note for a politician who so frequently trumpets his fiscal responsibility. It is of great concern to this Grand Jury that Shirk's behavior will expose the taxpayers of this Circuit or State to significant financial loss. Such reckless behavior can neither be condoned nor permitted. In an era in

which political activity is an ongoing and never-ending race to the bottom, this Grand Jury must draw the line somewhere so that alleged public servants can be put on notice that citizens will hold them accountable. It is a maxim often uttered but rarely acted upon that politicians serve at the will and pleasure of the people. When they fail to do so, it is the people who must hold them responsible.

As to Shirk himself, the Grand Jury concludes that he has engaged in inappropriate relationships with persons over whom he had supervisory authority. These relationships transcended what might be considered to be within the norm in a professional workplace and constitute behavior that lessens the confidence of the public in those responsible and in their ability to effectively manage an important public office. As such the Grand Jury strongly reprimands Shirk for his behavior.

While perhaps de minimis in nature, the Grand Jury likewise cannot condone the use of alcohol by Shirk in his office, if only for the simple reason that it is a criminal violation of city code provisions that specifically provide that alcohol consumption in city buildings such as the Public Defender's Office is a criminal violation. Shirk, a criminal defense attorney and the elected head of the Circuit's largest criminal defense law firm, surely knew of the applicable ordinance and even more surely is charged with knowing of it. Indeed, literally hundreds of such cases are filed against others each year and while the Grand Jury has not conducted a case by case review to differentiate cases that occur in public parks, for example, from those that might occur in public offices such as Shirk's, that distinction is legally meaningless. That this offense is of comparatively minor significance is also legally meaningless. The only reason the Grand Jury has not indicted Mr. Shirk for this offense is because it would not be in the Grand Jury's view, a prudent expenditure of public funds to proceed on such a case.

Compounding the displeasure the Grand Jury expresses, Shirk was not merely drinking by himself, or drinking with ranking staff members, or arguably entertaining outsiders with whom that might be considered appropriate for social or professional reasons but for the illegality involved. He was, instead, continuing the pattern of inappropriate behavior discussed above in a way that cannot but call his judgment into question

Further, all alcoholic beverages must be removed from and not returned to Shirk's personal office or the building occupied by the Public Defender's Office. Compliance with city code in this regard is an absolute.

The Grand Jury recommends and indeed expects that the rules set down for management of public offices, specifically the Public Defender's Office, be not just thoughtfully drawn, as was the case here, but also that they be followed by all involved, including the head of the organization. Had Shirk done so, much of what has consumed so much time and attention might never have transpired.

The Grand Jury next notes that Florida has a strong public records policy that requires the maintenance of documentation by public offices as to official business, not

for the purpose of obstructing or making the functioning of public offices difficult but rather so that the public can be assured that those offices are conducting business appropriately. The importance of these laws is underscored by the fact that violations of them can under some circumstances even constitute a felony criminal offense punishable by imprisonment. At its most basic level, Florida law requires that "[P]ublic records shall be maintained and preserved" as provided for in statute.

From the testimony the Grand Jury has heard, deletion of the data regarding Shirk's wife's entry card key amounts to alteration of a public record, which would be contrary to law. That the nature of this data might be considered inconsequential or of little relevance to the functioning of the Public Defender's Office is meaningless. That the City of Jacksonville was the custodian of such record is meaningless, all agencies have a responsibility to maintain and not alter existing public records they have access to.

The Grand Jury concludes that Mallet believed that the removal of Mrs. Shirk's key card information would somehow prevent knowledge of what had happened with Mrs. Shirk from being publically confirmed. The Grand Jury has considered returning an Indictment for these actions, but chooses not to do so, first as to the employee who literally accomplished the deletion because of the impossible position she was placed in by her supervisor, and second as to Mallet because as a long time private sector employee he was unfamiliar with the requirements of public records maintenance, and the results of his actions were intentional. The fault for this rests solely with Shirk as the elected official responsible for compliance in such matters. The Grand Jury has heard no evidence showing that Shirk was himself actively complicit in this deletion of records, and he is accordingly not subject to Indictment for it either. What he is at fault for is his failure to have established adequate policies to ensure that public records requirements were followed and to have ensured that his staff was adequately trained to do so.

The Public Defender's Office lacked any official policy regarding the compliance with, training procedures, or safeguard to ensure that Florida's Public Records laws were adhered to. The fact that as of this presentment there are inadequate procedures for the aforementioned in place, is of great concern to this Grand Jury.

The Grand Jury makes the following recommendations to ensure that such failures will be avoided in the future. Recommendations:

1) Sufficient data storage for compliance with public records laws must be planned for and obtained.
2) Proper training for public records requirements must be instituted for all employees.
3) Appropriate safeguards must be put in place to ensure that public records request are recorded and responded to in an efficient, timely and complete manner and that the record of such requests is retained.
4) Clear and concise office policy must be implemented and followed.

A law review article brought to the Grand Jury's attention during its discussions makes the following point: "In the age of revelation, sensitive information will come to light whether it ought to or not. Whether it is our love lives or political strategies, all will come to light. For better or worse, everything from furtive street crimes to genomes will come to light." Recent history is replete with examples of what might have in another day and age remained private conduct - or mis-conduct - becoming very public knowledge, accompanied by disgrace, downfall, embarrassment and loss of respect for both individuals and institutions. Political leaders, religious leaders, military leaders, business leaders, sports and entertainment figures, national, international, and local - all have fallen victim to the consequences of their personal foibles. While it may or may not be that persons in the public eye are subjected to a double standard in how they conduct their personal affairs, they nonetheless are held to a higher and different standard than those who they represent, govern, lead or otherwise influence. How else could they make the rest of us or our society better?

Perhaps people, politicians, and managers have always behaved the way Shirk has. Certainly some have. Perhaps it is a function of individual character or immaturity. Regardless, we live in an age where there are both different expectations, at least for our elected officials, and enormous transparency, voluntary or not, known or not. This report is intended to be a cautionary warning to more than just Shirk. In summary fashion, if this were a parliamentary proceeding then this Presentment should be read as a vote of no confidence in Shirk's leadership and ability to hold the office of Public Defender. He has put his personal interests first and has acted as if his office was a playpen intended to amuse and indulge his whims. In so doing, he has shown himself to be lacking the maturity to hold that office and possessed of an entitlement mentality that is simply unacceptable. That Shirk's unethical conduct has meanwhile endangered the reputation of his entire office is inexcusable. The lawyers and staff of the Fourth Circuit Public Defenders Office, deserve better than a leader whose actions embarrass them and call their own work into question.

The Grand Jury does not write this Presentment with the intent of castigating or embarrassing Shirk or anyone else involved in these matters. Rather, we report our findings and conclusions with the expectation that they will be taken seriously and that lessons will be learned by all. The Grand Jury believes that not just it as a body but the community as a whole is entitled to expect its elected officials to comport themselves with maturity and an understanding that the position of public trust bestowed upon them will be taken seriously. No elected official who conducts him or herself and the business of his or her office with honor need fear recrimination. Elected officials who cannot or will not do so, however, are not and should not be above criticism, including the searching eye of a Grand Jury, the constituency being served, and the electorate that puts them in office to begin with.

FINAL RECOMMENDATIONS

All of that having been said, and in a light of its lack of confidence in Shirk, the Grand Jury makes the following final recommendations and requests:

1. For all of the reasons and facts outlined herein, and based on the Grand Jury's belief that he is not fit to serve in the position he holds, the Grand Jury calls upon Shirk to immediately resign from his position as Public Defender of the Fourth Judicial Circuit.

2. The Governor of the State of Florida shall be provided with a copy of this Presentment by the State Attorney, along with the request of the Grand Jury that the Governor consider the removal of Shirk from office should he not resign therefrom. The Grand Jury does not believe that simply waiting for the next election cycle in 2016 or allowing political processes to intervene adequately addresses the immediate needs of the community. To allow Shirk to remain in office for one more day than is absolutely necessary, exposes citizens of this community to unnecessary financial and legal risk.

3. The State Attorney is also directed to provide a copy of this Presentment to both the Florida Bar and the Florida Commission on Ethics for their review, most particularly to as to the matters contained herein regarding Cristian Fernandez, with the request of the Grand Jury that each review the remedies available to it and institute appropriate action. The Grand Jury is aware of the limitations involved with each but believes that it is essential that those forums be involved.

Dated this 16 day of December, 2014.

Foreperson of the Grand Jury

Clerk of the Grand Jury

I certify that as required by law I have advised the Grand Jury as to all applicable law in this matter.

William P. Cervone
State Attorney, Eighth Judicial Circuit
By Executive Assignment Of The Governor